Supreme Court, U.S.
FILED
AUG 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2066

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

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W.S. KIRKPATRICK & CO., INC., *et al.*,
*Petitioners*,

v.

ENVIRONMENTAL TECTONICS CORPORATION,
INTERNATIONAL,
*Respondent.*

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**On a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

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## BRIEF OF THE REPUBLIC OF CHINA AS *AMICUS CURIAE*

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August 24, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## BRIEF OF THE REPUBLIC OF CHINA AS *AMICUS CURIAE*

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This *amicus curiae* brief is submitted in support of petitioner W.S. Kirkpatrick & Co., Inc. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

### INTEREST OF *AMICUS CURIAE*

*Amicus*, the Republic of China, is a sovereign state with close commercial and political ties to the United States. The Republic of China is one of the United States' largest trading partners and accounts for a significant portion of foreign investment in the United States. One important aspect of the substantial bilateral trade between the Republic of China and the United States has been the Republic's policy of effectively encouraging U.S. companies to bid for government construction and other projects in the Republic of China.

*Amicus* thus has two related interests in the application of the Act of State doctrine in this case. First, the extensive commerce between the two countries has inevitably led to disputes between U.S. citizens and either the Republic of China itself or its citizens. As a result, the Republic of China has not infrequently found itself involved in U.S. court proceedings in which its actions have been brought into question. The Republic of China thus has regularly observed the application of the Act of State doctrine and its role in removing U.S. courts from situations where ruling on pending claims could jeopardize U.S. foreign relations with sovereign states.

Second, the Republic of China is concerned about the consequences of permitting disgruntled bidders to challenge foreign government contract awards in U.S. courts by alleging improprieties in the foreign government's award process. These actions would necessarily discourage U.S. companies from bidding, and foreign governments from making, awards to U.S. competitors.

## ARGUMENT

This case requires U.S. courts to determine whether the Act of State doctrine precludes adjudication of a claim that a U.S. company obtained a government construction contract from a foreign government by paying bribes to high officials of that government that were illegal under U.S. law. Unlike the earlier federal prosecution of the defendant U.S. company, the present action would require U.S. courts to determine whether the alleged bribes were actually paid (rather than merely offered) and, if paid, whether they caused the foreign government to award the contract to the U.S. company.

This case touches upon several fundamental questions concerning application of the Act of State doctrine—questions that have been vigorously debated by lower courts and commentators for years. In addressing these questions, *amicus* Republic of China urges the Court to avoid

resort to mechanical formulae, such as whether the foreign government's act of awarding a contract was "commercial" rather than "governmental," or whether the case requires inquiry into the "validity" of the foreign government's acts or merely into its "motivations." Rather, the Act of State doctrine is a flexible, pragmatic rule, whose scope should be determined by reference to the purposes underlying the doctrine.

The Act of State doctrine reflects two fundamental concerns. First, and most important from the point of view of foreign nations, the Act of State doctrine is an expression of the general principle of international comity, which admonishes that nations should generally respect and give effect to foreign governmental interests and public policies. Nonetheless, it is clear that U.S. public policy must limit the extent to which U.S. courts defer to foreign nations and their governmental interests. The task of ascertaining U.S. policies implicates the second indispensable principle underlying the Act of State doctrine—the U.S. constitutional principle of separation of powers. This principle provides that it is for the Executive and Legislative Branches—not the Judiciary—to articulate the policy of the United States towards foreign nations and to conduct foreign relations with other countries.

Informed by these underlying principles of comity and separation of powers, this Court should apply the Act of State doctrine to preclude adjudication of the claims presented in this case. The award of the foreign government contract here was a sovereign Act of State—despite its arguably "commercial" nature—because it was taken by high foreign government officials, within the territory of the foreign sovereign, pursuant to foreign laws and regulations reflecting important public policies of the foreign sovereign, and because the claim involved here challenges the integrity and regularity of the internal decision-making process of the foreign government. Similarly, the trial court in this case is being asked to "sit in judgment"

on the foreign Act of State. Although the challenge to the contract award in this case arguably does not extend to the "validity" of the foreign sovereign act, the relief requested would nonetheless be fundamentally inconsistent with foreign public policy and sovereign interests. If there were corruption in high levels of a foreign government, it would be for that government—not for U.S. trial courts—to address. On a subject that touches so sharply on "national nerves," foreign governments should be left free to pursue the alleged corruption of their officials according to their own procedures, at times of their own choice, and in formats of their own selection.

Finally, there is no U.S. public policy that would override application of the Act of State doctrine in this case. Because neither the Legislative nor the Executive Branch has clearly articulated any U.S. public or foreign policy requiring adjudication of this dispute, the Act of State doctrine precludes U.S. courts from going forward.

## I. THE ACT OF STATE DOCTRINE IS A WELL-ESTABLISHED PRINCIPLE OF AMERICAN JURISPRUDENCE.

Since the very inception of the United States, the sovereign acts of foreign nations have been challenged in U.S. state and federal courts. Foreign nations have looked primarily to the Act of State doctrine to limit the permissible scope of such challenges and to ensure that appropriate judicial respect will be given to their interests and public policies.[1]

[1] In some circumstances, the doctrine of foreign sovereign immunity (now codified in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 to 1611 (1982 & West Supp. 1989) ("FSIA")) can also require U.S. courts to defer to the actions of foreign nations. The FSIA differs fundamentally, however, from the Act of State doctrine. Many of the FSIA's protections apply based on the status of the defendant as a foreign sovereign regardless of the governmental character of the actions involved, whereas the Act of State doctrine applies based on the governmental character of the actions involved regardless of whether the action names a foreign

The Act of State doctrine is a fundamental and well-established principle of U.S. jurisprudence. Long before the founding of the United States, the Act of State doctrine had appeared in the English common law.[2] And soon after independence the doctrine was invoked by U.S. courts in a series of cases, most notably *The Schooner Exchange v. McFaddon*.[3]

This Court stated the classic formulation of the Act of State doctrine in its 1897 decision in *Underhill v. Hernandez*: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the

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sovereign as defendant. *See* G. Born & D. Westin, *International Civil Litigation in United States Courts* 506-07 (1989); Restatement (Third) of Foreign Relations Law § 443, Reporters' Note 11 (1987).

[2] The Act of State doctrine dates to at least 1673, when it was invoked by an English court to give effect to a patent granted by the King of Denmark. *Blad's Case*, 3 Swans. 603, 36 Eng. Rep. 991 (P.C. 1673), *aff'd sub nom., Blad v. Bamfield*, 3 Swans. 604, 36 Eng. Rep. 992 (Ch. 1674). *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964). Later in *Duke of Brunswick v. King of Hanover*, 6 Beav. 1 (1844), *aff'd*, 2 H.L. Cas. 1 (1848), the House of Lords refused to consider a suit by the Duke of Brunswick challenging an instrument, executed by King William IV and confirmed by the German Diet, which placed him under the guardianship of the King of Hanover. Among other things, the House of Lords reasoned: "if it is a sovereign act, then, whether it be according to law or not according to law, we cannot inquire into it . . . . [I]f it be a matter of sovereign authority, we cannot try the fact whether it be right or wrong." *Id.* at 21. *See Underhill v. Hernandez*, 65 F. 577 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897) (relying on *Duke of Brunswick* as an Act of State decision). *See also* Jones, *Act of Foreign State in English Law: The Ghost Goes East*, 22 Va. J. Int'l L. 433, 437-40 (1982).

[3] 11 U.S. (7 Cranch) 116, 146 (1812) (Marshall, C. J.). *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808); *L'Invincible*, 14 U.S. (1 Wheat.) 238, 253 (1816); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 336 (1822).

government of another done within its own territory." [4] This formulation has been repeatedly reaffirmed throughout this century.[5]

More recently, in *Banco Nacional de Cuba v. Sabbatino*,[6] the Court extended the Act of State doctrine to preclude U.S. adjudication of claims that an expropriation violated international law. Since *Sabbatino*, the Court has grappled with proposed "exceptions" to the Act of State doctrine for "purely commercial acts" by foreign states [7] and for cases where the U.S. government has expressly represented that adjudication will not interfere with U.S. foreign relations.[8] Yet these cases have continued to affirm the vitality and fundamental importance of the basic Act of State doctrine.[9]

Quite apart from the extensive body of law articulated by this Court, the state and lower federal courts have issued literally hundreds of decisions on the Act of State doctrine.[10] Nor is the Act of State doctrine found in the

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[4] 168 U.S. 250, 252 (1897).

[5] *See, e.g., American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357-58 (1909); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918); *United States v. Belmont*, 301 U.S. 324, 327-29 (1937); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972); Restatement (Third) of Foreign Relations Law § 443 (1987).

[6] 376 U.S. 398 (1964).

[7] *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

[8] *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759.

[9] *First Nat'l City Bank*, 406 U.S. at 762-63, 765-67; *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983).

[10] *See* Annotation, *Modern Status of the Act of State Doctrine*, 12 A.L.R. Fed. 707 (1972 & Supp. 1988).

jurisprudence of the United States alone. Specifically relying on this Court's decisions, a number of nations around the world have recognized some form of the doctrine.[11]

Despite the long history and importance of the Act of State doctrine, various commentators over the years have urged reformulating or abolishing the doctrine.[12] Some have gone so far as to propose legislation to curtail the doctrine substantially.[13] All of these efforts have been rebuffed. The American Law Institute recently reaffirmed the classic statement of the doctrine,[14] while Congress has refused to adopt legislation aimed at overruling the Act of State doctrine.[15] And this Court has repeatedly reaffirmed the importance and viability of the basic Act of State doctrine.

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[11] *See* Restatement (Third) of Foreign Relations Law § 443, Reporters' Note 12 (1987); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 421 n.21; 6 M. Whiteman, *Digest of International Law* 1-20 (1970).

[12] *E.g.*, Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325 (1986); Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 Am. J. Int'l L. 68 (1985); Mathias, *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform*, 12 Law & Pol'y Int'l Bus. 369 (1980).

[13] *See* S. 2633, 96th Cong., 2d Sess., 126 Cong. Rec. 9,452-53 (1980); S. 1434, 97th Cong., 1st Sess., 127 Cong. Rec. 13,959-60 (1981) (proposals by Senator Charles Mathias, Jr.); *See* Mathias, *Restructuring the Act of State Doctrine* at 408-12; Bazyler, *Abolishing the Act of State Doctrine* at 393-94; *but see*, Longo, *Limiting the Act of State Doctrine: A Legislative Initiative*, 23 Va. J. Int'l L. 103 (1982).

[14] *See* Restatement (Third) of Foreign Relations Law § 443 (1987).

[15] Congress instead recently enacted a statute establishing a narrow exception to the Act of State doctrine, applicable in proceedings to enforce or confirm certain international arbitration agreements or awards rendered against foreign states. *See* Act of Nov. 16, 1988, Pub. L. No. 100-669, § 1, 102 Stat. 3969 (codified at 9 U.S.C. § 15 (1988)).

## II. THE ACT OF STATE DOCTRINE IS BASED ON THE DUAL PRINCIPLES OF INTERNATIONAL COMITY AND SEPARATION OF POWERS.

Commentators and courts have suggested an array of justifications for the Act of State doctrine. Some have described the doctrine as a choice-of-forum device.[16] Others have said it is a choice-of-law principle,[17] or a rule of issue preclusion.[18] And perhaps most frequently, the Act of State doctrine has been described as a principle of judicial abstention or restraint.[19] Although each of these characterizations may be apt in a particular case,[20] none

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[16] *Oetjen*, 246 U.S. at 304.

[17] Leigh & Sandler, *Dunhill: Toward a Reconsideration of Sabbatino*, 16 Va. J. Int'l L. 685, 715-16 (1976); *Alfred Dunhill*, 425 U.S. at 705 n.18; *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 51 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

[18] *National Am. Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622, 640 n.30 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

[19] *E.g.*, *Alfred Dunhill*, 425 U.S. at 715 (Powell, J., concurring in judgment); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 74 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Phoenix Canada Oil Co. v. Texaco Inc.*, 560 F. Supp. 1372, 1381 n.27 (D. Del. 1983), *aff'd in part and rev'd in part*, 842 F.2d 1466 (3d Cir.), *cert. denied*, 109 S. Ct. 259 (1988).

[20] Depending upon the circumstances in which it is invoked, the Act of State doctrine can function as a choice-of-forum, choice-of-law or abstention device. For example, in cases such as *Oetjen v. Central Leather Co.*, 246 U.S. at 304, the Act of State doctrine was invoked to require a U.S. plaintiff to pursue his remedies in foreign courts or through diplomatic negotiations in which his claim would be sponsored by the U.S. Government; this amounted to a refusal by the U.S. court to apply either U.S. or foreign law. In contrast, in *Sabbatino* the Act of State doctrine was invoked to validate a foreign Act of State and thereby permit a foreign plaintiff to recover property from a U.S. defendant; this amounted to a choice of foreign law that the U.S. court applied. *See* Restatement (Third) of Foreign Relations Law § 443, Reporters' Note 1 (1987) ("In most cases, the act of state doctrine may be seen as a special

adequately reflects the two fundamental bases for the Act of State doctrine: the principle of international comity and the principle of separation of powers.

### A. The Principle of International Comity.

The Act of State doctrine had its origins in the principle of international comity. In *The Schooner Exchange v. McFaddon*, Chief Justice Marshall traced both the common law rule of sovereign immunity and the Act of State doctrine to notions of comity among nations.[21] Similarly, this Court's classic statement of the Act of State doctrine in *Underhill v. Hernandez* was foreshadowed by an earlier state court decision where the court reasoned that:

> "[w]e think that, by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sit-

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rule of conflict of laws."); Restatement (Second) of Foreign Relations Law § 41, comment c (1965).

The Act of State doctrine has also sometimes been tied to the constitutional doctrine of "political question." *See, e.g., The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) at 146 ("questions to which such [sovereign] wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428 ("the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it"). The Act of State doctrine is, however, entirely distinct from the political question doctrine. The latter is an Article III limitation on the jurisdiction of the federal courts, which generally applies to a different category of cases. *See Goldwater v. Carter*, 444 U.S. 996 (1979) (Powell, J., concurring); *Baker v. Carr*, 369 U.S. 186 (1962).

[21] 11 U.S. (7 Cranch) 116, 137 ("This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to [waive] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.").

> ting in judgment on the acts of another government done within its own territory." [22]

And even more explicitly, in *Oetjen v. Central Leather Co.*, the Court explained that:

> "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . *rests at last upon the highest considerations of international comity and expediency.* To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments, and vex the peace of nations.' " [23]

The Act of State doctrine is only one of many applications by this Court of the principle of international comity. Thus, the comity principle has been invoked to determine the effect to be given by U.S. courts to foreign judgments in routine private litigation.[24] Comity has also served to define the extent to which U.S. courts must respect foreign laws or regulatory frameworks when ordering discovery of evidence located abroad,[25] or when

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[22] *See* Underhill, 168 U.S. at 252 *and Hatch v. Baez*, 14 N.Y. Sup. Ct. (7 Hun.) 596, 599 (App. Div. 1876).

[23] 246 U.S. at 303-04 (*quoting Underhill*, 65 F. at 579 (emphasis added)). *Accord, Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 438 ("the act of state doctrine . . . shares with the immunity doctrine a respect for sovereign states"); *First Nat'l City Bank*, 406 U.S. at 762 (Op. of Rehnquist, J., for plurality) ("both the act of state and sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government"); *id.* at 765 ("[t]he act of state doctrine, like the doctrine of immunity for foreign sovereigns, has its roots, not in the Constitution, but in the notion of comity between independent sovereigns."); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 352 (1909).

[24] *Hilton v. Guyot*, 159 U.S. 113 (1895).

[25] *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987).

applying U.S. substantive laws extraterritorially.[26] And comity has been invoked in determining when U.S. courts should give effect to agreements for the resolution of disputes by foreign courts[27] or international arbitration tribunals.[28]

The doctrine of comity is not merely a vague, precatory notion of international courtesy and good-will. Instead, in numerous contexts, the principle of international comity has defined "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens. . . ."[29] As this Court has repeatedly held, comity therefore requires a sensitive analysis in particular cases of (1) foreign sovereign interests and public policies; (2) U.S. sovereign interests and public policies; and (3) the goal of an efficient and developed international system.[30] Applying this analysis, U.S. courts have

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[26] *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953) ("acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations"; "considerations of comity, reciprocity and long-range interest"); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959).

[27] *Bremen v. Zapata Off-Shore*, 407 U.S. 1, 9, 13-14 (1972).

[28] *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system").

[29] *Hilton v. Guyot*, 159 U.S. at 164. *See also* J. Story, *Commentaries on the Conflict of Laws* §§ 33-38 (1834).

[30] *See Aerospatiale*, 482 U.S. at 543-44; *Hilton v. Guyot*, 159 U.S. at 163-64 ("respective interests of the foreign nation and the requesting nation"); *Romero*, 358 U.S. at 383 ("the interacting interests of the United States and of foreign countries"); *Lauritzen v. Larsen*, 345 U.S. at 582 ("ascertaining and valuing points of contact between the transaction and the states or government whose competing laws are involved").

frequently concluded that "international duty and convenience" call for respecting and giving effect to foreign governmental interests and public policies.[31] The Act of State doctrine—which applies to peculiarly sovereign and sensitive acts by foreign states, consummated within their own territory—is the most emphatic example of this deference.

**B. The Separation of Powers Doctrine.**

Foreign nations would of course prefer that the Act of State doctrine begin and end with deference to their policies: The United States would respect the governmental interests and public policies of foreign states in every case, and U.S. courts would never adjudicate claims that called those interests into question. As most foreign states acknowledge, however, there are occasions in which important U.S. interests and public policies may require a different result.

Responsibility for articulating U.S. public policies in the international context lies with Congress and the President. This Court has repeatedly recognized the peculiarly broad authority of these political branches in the foreign relations and foreign commerce fields. Thus, the Court has acknowledged "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of foreign relations."[32] And it has described the constitutional powers of the Legislative branch over foreign commerce in comparably broad terms.[33]

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[31] *See* notes 24-28 *supra*. *See also* G. Born & D. Westin, *International Civil Litigation in United States Courts* 14-18 (1989).

[32] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

[33] *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-49 (1979); *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

The broad powers of the political branches in the international context are accompanied by a corresponding reluctance by U.S. courts to enter into areas where their rulings could interfere with the conduct of U.S. foreign relations. This reluctance has been repeatedly cited as one of the primary reasons for the Act of State doctrine. Thus, in *Oetjen v. Central Leather Co.*, this Court observed that

> "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." [34]

Even more explicitly, Justice Harlan explained in *Banco Nacional de Cuba v. Sabbatino* that, although "the Constitution does not require the act of state doctrine," the doctrine nevertheless has " 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers." [35]

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[34] 246 U.S. at 302. Similarly, in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) at 146, Chief Justice Marshall explained that one of the reasons for deferring to the acts of foreign sovereigns was that "the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign."

[35] 376 U.S. at 423. *Accord, First Nat'l City Bank*, 406 U.S. at 762 (Op. Rehnquist, J., for plurality) ("both the act of state and sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government"); *id.* at 765 (the act of state doctrine "is also buttressed by judicial deference to the exclusive power of the Executive over conduct of relations with other sovereign powers and the power of the Senate to advise and consent on the making of treaties").

Because it is a rule with "constitutional underpinnings" centering around concerns over U.S. relations with foreign sovereigns, the Act of State doctrine implicates powerful and uniquely federal interests. *See Hines v. Davidowitz*, 312 U.S. 52 (1941); *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *First National*

In short, the Act of State doctrine is born of the confluence of the two basic principles of comity among nations and separation of powers. The former principle calls on each nation to respect and give effect to the sovereign actions of other nations and thereby avoid conflict and confrontation. The latter principle specifies that, if the United States is to be involved in international conflict, that conflict should come through the articulated public policy decisions of the President and Congress—not through actions of the courts. Together, the two principles require generally that U.S. courts respect and give effect to foreign government interests and public policies except where the political branches have clearly and expressly articulated a public policy to the contrary.

## III. THE ACT OF STATE DOCTRINE IS A FLEXIBLE RULE WHOSE APPLICABILITY MUST DEPEND ON THE NATURE OF THE FOREIGN SOVEREIGN ACT AND THE CHALLENGE BEING MADE TO THAT ACT.

The principles giving rise to the Act of State doctrine determine its scope and application in particular cases. These principles require that the Act of State doctrine remain a flexible rule, sensitive to the many varying exigencies and circumstances of international life, that cannot be reduced to wooden formulae.

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*City Bank v. Banco Para El Commercio Exterior de Cuba*, 462 U.S. 611 (1983); *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2515-16 (1988). The Act of State doctrine is, therefore, a uniform rule of federal common law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 425 ("an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community *must be treated exclusively as an aspect of federal law*") (emphasis added); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 50 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1597 (1987).

Any rule based on the comity principle must depend upon a careful and flexible assessment of U.S. public policies, foreign public policies, and the needs of the international system. For example, in *Aerospatiale* the Court explained that the doctrine of international comity required a "delicate task of adjudication" that encompassed a "particularized analysis of the respective interests" of the U.S. and relevant foreign sovereigns.[36] And as Justice Joseph Story—this country's preeminent commentator on comity—explained: "comity is, and ever must be, uncertain. . . . it must necessarily depend on a variety of circumstances, which cannot be reduced to any certain rule. . . ." [37]

The Act of State doctrine also requires the flexibility to respond to many different types of foreign sovereign actions. These actions can take any of a wide variety of forms,[38] expressing a range of foreign sovereign interests of differing intensity and importance.[39] In the early

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[36] 482 U.S. at 543-44, 546.

[37] J. Story, *Commentaries on the Conflict of Laws* § 28 (1834). Or, in the Court's words in *Romero v. International Terminal Co.*, 358 U.S. at 383, comity does "not depend upon a mechanical application of a doctrine like that of *lex doci delicti commissi*."

Just as comity has been understood as prescribing a necessarily flexible analysis, the separation of powers doctrine generally calls for a case-by-case, pragmatic analysis. *E.g., Morrison v. Olson*, 108 S. Ct. 2597, 2620-22 (1988). This is particularly true in the field of foreign relations and foreign commerce powers. *E.g., Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("spectrum [of Executive power] running from explicit congressional authorization to explicit congressional prohibition").

[38] *See Salaman v. Secretary of State of India*, [1906] 1 K.B. 613, 640 ("Acts of state are not all of one kind: their nature and consequences may differ in an infinite variety of ways. . . .").

[39] *See Sabbatino*, 376 U.S. at 428 ("It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for

days of the Nation, this Court typically applied the Act of State doctrine to the seizures of ships by other nations during times of war or by colonists fighting for independence from European powers.[40] In *Underhill v. Hernandez*, the issue arose out of the imprisonment of an American in Venezuela by rebel forces during a civil war ultimately won by the rebels.[41] And in this century, the Court has most often dealt with the Act of State doctrine in sorting out the complicated consequences that have flowed from confiscation of property by foreign regimes.[42] At the same time, U.S. judicial proceedings can implicate foreign sovereign acts in many different ways, ranging from direct challenges to the validity of foreign acts to mere consideration of foreign sovereign acts as contextual background.[43]

Because foreign Acts of State can arise in such widely varying circumstances, this Court has expressly declined

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exclusivity in the political branches."); Restatement (Second) of Foreign Relations Law § 41, comment d (1965).

[40] *See The Santissima Trinidad, supra*; *L'Invincible, supra*; *Hudson v. Guestier, supra*. In invoking the doctrine, the Court made clear that it was important to preserve a U.S. policy of neutrality in the face of disputes among other nations and their colonies. *See, e.g., The Santissima Trinidad, supra*.

[41] 168 U.S. at 250-52.

[42] *See, e.g., Banco Nacional de Cuba v. Sabbatino, supra*; *First National City Bank, supra*. In addition to the situations thus far addressed by this Court, the state and lower federal courts have considered the doctrine in circumstances ranging from imposition of foreign exchange controls by Less Developed Countries to diverse private claims based on allegations of wrongdoing by high foreign government officials. *See, e.g., Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1597 (1987); *Republic of Philippines v. Marcos*, 818 F.2d 1473 (1987), *vacated*, 862 F.2d 1355 (9th Cir. 1988) (en banc); *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984).

[43] *See infra* pp. 22-23.

to "lay[] down or reaffirm[] an inflexible and all-encompassing rule" governing the Act of State doctrine.[44] Instead, it has specifically required careful examination of the "balance of relevant considerations" in particular categories of cases.[45] Similarly, lower federal courts have repeatedly emphasized the flexible, pragmatic character of the Act of State doctrine.[46]

## IV. THE ACT OF STATE DOCTRINE PRECLUDES ADJUDICATION OF THE PRESENT DISPUTE.

To say that the Act of State doctrine is flexible and requires consideration of a wide range of factors is not to say that it is without structure. On the contrary, two basic and closely related requirements must be satisfied before the doctrine will be applied: (a) there must be an "Act of State"; and (b) adjudicating a dispute must require the U.S. court to "sit in judgment" on that Act of State. Both of these prerequisites flow directly from the comity and separation of powers principles that give rise to the Act of State doctrine. Applying these two prongs of the doctrine to the present case, we submit that this action should be dismissed on Act of State grounds because it would require the U.S. courts to "sit in judgment" on a foreign "Act of State."

### A. This Foreign Government Contract Award Was An "Act of State."

The first question to be addressed in deciding whether the Act of State doctrine applies to the present case is

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[44] *Sabbatino*, 376 U.S. at 428.

[45] *Id. Accord, First Nat'l City Bank*, 406 U.S. at 774 (Powell, J., concurring in judgment) ("The balancing of interests, recognized as appropriate by *Sabbatino*, requires a careful examination of the facts in each case and of the position, if any, taken by the political branches of government.").

[46] *E.g., DeRoburt v. Gannett Co.*, 733 F.2d 701, 703 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985); *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 325-26 (5th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983); *IAM v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

whether the relevant action of the foreign sovereign—the award of a government contract—was an "Act of State." As explained above, this Court has found a wide range of actions by foreign officials to be Acts of State. Nonetheless, it is abundantly clear that not all actions taken by foreign government officials are *ipso facto* Acts of State, entitled to the substantial deference afforded by the Act of State doctrine.[47]

In *Alfred Dunhill of London, Inc. v. Republic of Cuba*, the Court found that the refusal of intervenors appointed by the Cuban government to repay U.S. importers amounts they had been mistakenly paid was not an Act of State because there was no evidence showing that the intervenors had purported to exercise governmental power. 425 U.S. at 694. According to the Court, for the action of a foreign sovereign to be an Act of State, the "conduct in question [must have been] the *public act* of those with *authority to exercise sovereign powers*" [48] based on "statute[s], decree[s], order[s], [and] resolution[s]" of the foreign state.[49]

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[47] *Compare Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260, 1265 (3d Cir. 1987) (acts of foreign debtor's trustees are not acts of foreign sovereigns); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1533-36 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113 (1985) (presidential expropriation decree is not an Act of State until property is actually seized), *with DeRoburt v. Gannett Co.*, 733 F.2d 701 (9th Cir. 1984), *cert. denied*, 469 U.S 1159 (1985) (Act of State doctrine potentially is applicable to allegedly illegal loan to foreign head of state); *General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979) (military procurement decision is Act of State).

[48] 425 U.S. at 693 (emphasis added).

[49] *Id.* at 694. Similarly, the ALI's recent Restatement (Third) of Foreign Relations Law § 443 (1987) expressly provides that the Act of State doctrine generally precludes U.S. courts from "examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on *other acts of a governmental character done by a foreign state within its own territory and applicable there*" (emphasis added).

Whether a given action of a foreign government official is entitled to treatment as an Act of State must be determined, not by labels, but by consideration of the extent to which the action expresses important sovereign interests or public policies of a foreign state. Various factors are relevant to this analysis, but none is, in and of itself, determinative. Most important is the extent to which foreign laws—whether constitutional provisions, statutes, administrative measures, executive decrees or judicial judgments—themselves purport to express a sovereign or public interest.[50] Also relevant is the degree to which an action implicates the core purposes and functions of independent nation-states—such as ensuring national defense, administering a system of public law and justice, organizing local political and governmental structures, providing basic social services and protections, defining national territory, and regulating private activities.[51] In this connection, one significant factor is the extent to which private individuals can and ordinarily do independently undertake the actions in question.[52] Another relevant consideration is the scope and

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[50] *See Alfred Dunhill*, 425 U.S. at 694-95 (referring to foreign law for evidence of sovereign interest or public policy); Restatement (Third) of Foreign Relations Law § 443, comment i (1987) ("An official pronouncement by a foreign government describing a certain act as governmental is ordinarily conclusive evidence of its official character.").

[51] *Alfred Dunhill*, 425 U.S. at 693-95; Restatement (Second) of Foreign Relations Law § 41, comment d (1965) (an Act of State "involves the public interests of a state as a state, as distinct from its interest in providing the means of adjudicating disputes").

[52] In *Alfred Dunhill*, a plurality of this Court concluded that the Act of State doctrine did not extend to "the repudiation of a purely commercial obligation." 425 U.S. at 695. The "commercial exception" recognized by the plurality opinion was expressly limited to certain "purely commercial" acts, and is entirely consistent with this Court's more general approach of defining "Act of State" by

degree of authority of the foreign governmental official, or agent of the foreign state,[53] whose actions are subject to scrutiny.[54] Similarly, the importance and political sensitivity of any applicable governmental interests or public policies are also a pertinent consideration.[55] And finally, a foreign nation's action will more likely be treated as an Act of State if it can be said to have been taken within the nation's own territory, rather than in the United States or in a foreign territory.[56]

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reference to a variety of factors. *See also IAM v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

[53] Acts of high foreign governmental officials are more likely than those of lower officials to constitute Acts of State. *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3d Cir. 1979) (excluding "ministerial" acts from Act of State doctrine). Acts of a foreign governmental official are more likely to be treated as Acts of State than are acts of private entities carrying out governmental directives. Nonetheless, where a private entity engages in conduct in a foreign state pursuant to foreign sovereign compulsion, a variation of the Act of State doctrine will often be applicable. *See Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). Similarly, there may be circumstances in which a private entity acts as an arm of a foreign state, thereby providing its actions with Act of State protection. *Cf. Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980). On the other hand, where a private entity engages in purely private misconduct without foreign sovereign compulsion, approval or complicity, the Act of State doctrine is inapplicable. This was the result in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962) ("there is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped").

[54] *See, e.g., Mannington Mills*, 595 F.2d at 1293-94; *Alfred Dunhill*, 425 U.S. at 691 (actions by intervenors and statements by counsel are not Acts of State).

[55] *See* note 39 *supra*.

[56] In its classic formulation, the Act of State doctrine was applicable to acts of foreign states consummated within their own territory. *See Underhill*, 168 U.S. at 252; *Sabbatino*, 376 U.S. at

Applying these considerations to the present case, the activities of the foreign government here were clearly "Acts of State." The actions giving rise to this case occurred within the foreign state's territory and were taken by high-level government officials. Moreover, the actions were taken as part of a regularized governmental process that reflects important public policies that have in no way been repudiated by the foreign government. Most important of all, however, is the fact that the respondent's allegations in this case do not question the simple fact of a governmental contract award, but instead *challenge the integrity and regularity of the internal governmental decision-making process that led to the granting of the contract.* Regulating this sort of internal decision-making process is plainly at the heart of national sovereignty and implicates foreign public policies that bear as sharply on "national nerves" as any issue does.

### B. Adjudicating Whether the Award of the Foreign Government Contract Was the Result of Bribery Would Require the U.S. Court To "Sit in Judgment" on the Foreign "Act of State."

Once this case has been found to involve an Act of State, it becomes necessary to ascertain whether litigating the action would violate the Act of State doctrine. As this Court explained in *Underhill v. Hernandez*, a U.S. court may not "sit in judgment" on a foreign Act of State.[57]

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413-19; Restatement (Third) of Foreign Relations Law § 443 and comment b and Reporters' Note 4 (1987). Lower U.S. courts have denied Act of State treatment to foreign sovereign actions within the United States, *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985), although some courts have held that even acts within the United States will be given effect if they are consistent with U.S. policy. *Id. See also Drexel Burnham Lambert Group Inc. v. Galadari*, 777 F.2d 877 (2d Cir. 1985).

[57] *Underhill*, 168 U.S. at 252. *See also Hatch v. Baez*, 14 N.Y. Sup. Ct. at 599 ("courts of one country are bound to abstain from

The same formulation has been repeated in this Court's subsequent decisions [58] and was recently adopted by § 443 of the ALI's Restatement (Third) of Foreign Relations Law (1987).[59]

U.S. courts have considered whether they would be required to "sit in judgment" on a foreign Act of State in a wide range of circumstances. Often private litigants have sought damages [60] or injunctive relief [61] directly against foreign sovereigns for their allegedly unlawful Acts of State. In other cases, the complaint of one private party against another has rested upon the alleged invalidity or unlawfulness of a foreign Act of State.[62] And other actions have alleged the unlawfulness of activities by private entities that were compelled by foreign sovereigns [63] or were taken in the context of pervasive foreign governmental regulations or actions.[64] Sometimes the Act of State doctrine has been invoked in cases where the private party is alleged to have violated U.S. law by improperly procuring foreign sovereign acts through

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sitting in judgment on the acts of another government done within its own territory.").

[58] *See* note 5 *supra*.

[59] Restatement (Third) of Foreign Relations Law § 443 (1987) ("sitting in judgment on other acts of a governmental character").

[60] *Underhill v. Hernandez*, *supra*.

[61] *IAM v. OPEC*, *supra*.

[62] *Oetjen v. Central Leather Co.*, *supra*; *Ricaud v. American Metal Co.*, *supra*.

[63] *Interamerican Refining Co. v. Texaco Maracaibo, Inc.*, *supra*.

[64] *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); *O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449 (2d Cir. 1987), *cert. denied*, 109 S. Ct. 303 (1988).

fraud,[65] anticompetitive conduct,[66] or bribery.[67] Finally, U.S. courts have sometimes been asked to decide whether high officials of foreign governments have taken actions that would be illegal or politically embarrassing abroad.[68]

Whether a U.S. court will be required to "sit in judgment" on a foreign Act of State in these very different situations cannot be resolved by any simple formula. Instead, the inquiry goes to the heart of the Act of State doctrine and the principles of comity and separation of powers that underlie it. To apply the Act of State doctrine, a court must evaluate the extent to which ruling on the claim before it would undermine or conflict with important governmental interests or public policies of a foreign sovereign.

One important consideration in this analysis is whether the foreign state, or its officials, are defendants in the suit. If so, a U.S. court's inquiry is particularly likely to result in its "sitting in judgment" on a foreign Act of State.[69] Another important, but by no means conclusive, consideration is whether a U.S. court would be directly or indirectly required to hold a foreign Act of State unlawful or invalid.[70] If a U.S. court is required to adjudicate

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[65] *See Mannington Mills*, 595 F.2d at 1292-93.

[66] *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

[67] *See Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), *cert. granted*, 57 U.S.L.W. 3841 (1989).

[68] *See DeRoburt v. Gannett Co.*, 733 F.2d 701 (foreign President alleged to have secretly supported and made arguably illegal loans to separatist elements in neighboring country).

[69] *See, e.g., Underhill v. Hernandez, supra.* In contrast, where a foreign state *itself* brings an action in U.S. courts, the Act of State doctrine will virtually never be applicable to bar the foreign state's complaint. *See Banco Nacional de Cuba v. Sabbatino, supra.*

[70] *See Sabbatino, supra.*

the validity of a foreign Act of State, it is also important to consider whether this holding would be based on U.S., international, or foreign law. United States courts are particularly reluctant to consider whether a foreign Act of State violates the laws of the foreign state.[71]

Even if a U.S. court would not be required to rule on the technical legality or validity of a foreign Act of State, an important consideration is the extent to which the action would inquire into the fairness, honestly, integrity, or motivations of foreign governmental processes and officials.[72] When U.S. courts issue findings, or when U.S. litigants attempt to take discovery, on these and other matters that are of overriding concern to foreign states, they "sit in judgment" on foreign sovereign acts in the

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[71] *See Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 443 (2d Cir. 1940) ("the courts of this country will not examine the acts of a foreign sovereign within its own borders, in order to determine whether or not those acts were legal under the municipal law of the foreign state."); *Earn Line S.S. Co. v. Sutherland S.S. Co.*, 254 F. 126, 129 (S.D.N.Y. 1918), *aff'd sub nom., The Claveresk*, 264 F. 276 (2d Cir. 1920); *Duke of Brunswick v. King of Hanover*, 6 Beav. 1 (1984), *aff'd*, 2 H.L. Cas. 1 (1848) (English courts will not inquire whether sovereign act "was contrary to the laws of Hanover and Brunswick"); *American Banara Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909). *See also* Restatement (Third) of Foreign Relations Law § 443, comment d (1987); Restatement (Second) of Foreign Relations Law § 41, comment f (1965) ("An agency of an acting state is in a better position than the courts of another state to decide whether a particular action is valid under its law. Also, reexamination elsewhere could be regarded a lack of respect for the institutions of the acting state.").

[72] The Restatement (Third) of Foreign Relations Law § 443, comment c (1988) ("probe the motives"), takes the position that inquiring into the motivations or purpose of foreign Acts of State may be precluded by the Act of State doctrine. Although the Restatement (Second) of Foreign Relations Law § 41 (1965) did not expressly include inquiry into motivations within its black-letter statement of the Act of State doctrine, the relevant comments suggest that such an inquiry could well trigger the doctrine. *Id.* at comments c & f.

most elementary fashion.[73] And, finally, determining whether an action would result in "sitting in judgment" on a foreign Act of State requires careful analysis of the plaintiff's claims and the asserted foreign Act of State. There will be circumstances in which adjudication of the plaintiff's claim will not require questioning the validity, legality, integrity or fairness of foreign sovereign acts—even when those acts form a part of the disputed transaction[74]

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[73] In *Zschernig v. Miller*, 389 U.S. 429 (1968), this Court held that the administration of certain state probate statutes by state courts unconstitutionally intruded upon the foreign relations authority of the federal government. The Court's decision rested principally upon the fact that the state courts had "launched inquiries" into whether certain rights were "merely dispensations turning upon the whim or caprice of [foreign] government officials," *id.* at 434, into "whether the representation[s] of consuls, ambassadors and other representatives of foreign nations [are] credible or made in good faith," *id.*, and into "the administration of foreign law [and] the credibility of foreign diplomatic statements," *id.* at 442. There is no reason that similar inquiries by federal courts into the credibility and motivations of foreign governmental officials would be less objectionable than those held unconstitutional in *Zschernig*.

Even in the purely domestic context, this Court has counselled against the examination of the motivations or purposes of governmental officials in most circumstances. *See United States v. Morgan*, 313 U.S. 409, 422 (1941); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

[74] For example, in *United States v. Sisal Sales Corp.*, 274 U.S. 268, 274-76 (1927), private defendants violated the antitrust laws by buying large quantities of sisal, *id.* at 274, making large loans to facilitate additional sisal purchases, *id.*, and entering into contracts with various private entities to maintain close control over the distribution and sale of sisal, *id.* Although one part of this conspiracy was the defendants' successful efforts to obtain discriminatory legislation in Mexico, *id.* at 276, this Court emphasized that the defendants had independently engaged in conduct violative of the antitrust laws and that the plaintiff did *not* complain "merely of something done by another government at the instigation of private parties." *Id.*

The Act of State doctrine precludes judicial consideration of the present case because it would have a U.S. court "sit in judgment" on a foreign Act of State. The respondent's lawsuit would require a U.S. court to determine whether a foreign government awarded a contract because high government officials were unlawfully bribed. No foreign government or its officials are parties to this action, and it may theoretically be correct that respondent's suit does not require a ruling that the foreign government contract is invalid.[75] Nonetheless, where a U.S. court is asked to decide publicly whether high foreign governmental officials accepted bribes—conduct that would violate foreign law—the actions requested of the U.S. court are necessarily inconsistent with foreign sovereign interests and public policy. The resolution of such questions is most appropriately confided to the foreign government that is involved, according to its own procedures, and at a time and in a format of its own choice. It is, after all, the foreign government that has the greatest sovereign interest in the detection and punishment of corruption by its own officials and with selecting the appropriate means for taking such steps. And, of course, the judgment that respondent seeks from the U.S. courts would publicly embarrass the foreign government about an issue—charges of official corruption—which necessarily touches on sensitive "national nerves."

### C. The Political Branches Have Not Clearly Articulated any U.S. Public Policy Requiring Adjudication of this Dispute.

Because the Act of State doctrine is based on separation of powers principles as well as comity, there are cases in which U.S. policies require that the courts go forward even though doing so will result in their "sitting in judgment" on foreign Acts of State. For this to

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[75] There would, of course, be no doubt that the Act of State doctrine would apply to this action if the foreign state or its officials were named as defendants. *See Underhill v. Hernandez, supra.*

happen, however, the U.S. political branches must have clearly articulated a public policy requiring the judiciary to "sit in judgment" on particular categories of foreign sovereign acts. For example, the so-called "Hickenlooper Amendment" [76] removes a class of cases from the Act of State doctrine, while recent legislation dealing with international arbitration accomplishes a similar result.[77] Likewise, the so-called "treaty exception" to the Act of State doctrine requires judicial consideration of cases where the Senate and President have clearly expressed a public policy on a particular issue.[78]

Some members of this Court, as well as some lower federal courts, have concluded that the Act of State doctrine should not apply, even in the absence of a statute or treaty, if the Executive Branch publicly and expressly states that adjudication in U.S. courts will not be inconsistent with U.S. foreign policy.[79] This approach is

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[76] 22 U.S.C. § 2370(e)(2) (1982).

[77] 9 U.S.C. § 15 (1988).

[78] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428 (Act of State doctrine not applicable where there is "a treaty or other unambiguous agreement regarding controlling legal principles"). *See Kalamazoo Spice Extraction Co. v. Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984); *American Int'l Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 525 (D.D.C. 1980), *vacated on other grounds*, 657 F.2d 430 (D.C. Cir. 1981).

Conversely, there may also be situations in which U.S. public policy reinforces a result counselled by principles of comity. In *Sabbatino* itself, for example, U.S. public policy, as expressed in ongoing bilateral and multilateral diplomatic efforts by the Executive, *see* 376 U.S. at 431-34, counselled for application of the Act of State doctrine.

[79] *See Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 303 (3d Cir. 1982) (dictum); *Occidental of Umm Al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1204 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979); *Beck v. Manufacturers Hanover Trust Co.*, 125 Misc. 2d 771, 481 N.Y.S.2d 211 (Sup. Ct. 1984) (dictum); *First Nat'l City Bank*, 406 U.S. at 768 (Op. of Rehnquist, J.).

commonly referred to as the "*Bernstein* exception," after the lower court decision in which it was first asserted.[80] The *Bernstein* exception has been the subject of some controversy,[81] however, because it could involve the Executive Branch in the very sort of *ad hoc* and unpredictable decisionmaking with respect to foreign sovereigns that the political branches sought to avoid when Congress enacted the Foreign Sovereign Immunities Act.[82]

In the present case, the U.S. political branches have not clearly articulated a public policy that U.S. courts should hear this sort of private litigation concerning foreign official corruption. If anything, U.S. policy is to the contrary, for Congress specifically rejected a proposal

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[80] *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). *See* G. Born & D. Westin, *International Civil Litigation in United States Courts* 517-27 (1989).

[81] *See First Nat'l City Bank*, 406 U.S. at 773 (Op. of Douglas, J., concurring in result); *id.* (Op. of Powell, J., concurring in result); *id.* at 777 (Op. of Brennan, J., dissenting); *Braniff Airways, Inc. v. CAB*, 581 F.2d 846, 851 & n.18 (D.C. Cir. 1978) (dictum); *Hunt v. Coastal States Gas Producing Co.*, 570 S.W.2d 503, 507 (Tex. Civ. App. 1978), *aff'd*, 583 S.W.2d 322 (Tex.), *cert. denied*, 444 U.S. 992 (1979).

[82] Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 Corn. L.Q. 461 (1963); Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 Am. J. Int'l L. 168 (1946); Leigh, *Sovereign Immunity—The Case of the "Imias,"* 68 Am. J. Int'l L. 280 (1974); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in*, 1976 U.S. Code Cong. & Admin. News at 6610-11. *See also Rich v. Naviera Vacuba S.A.*, 295 F.2d 24 (4th Cir. 1961) (per curiam) (State Department suggestion of immunity in a clearly commercial case, made as *quid pro quo* to gain release of hijacked airplane); *Chemical Natural Resources, Inc. v. Republic of Venezuela*, 420 Pa. 134, 215 A.2d 864, *cert. denied*, 385 U.S. 822 (1966); *Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977* (eds. M. Sandler, L. Vagts & B. Ristau), *published in*, U.S. Department of State, *Digest of United States Practice in International Law* 1017 (1977).

that would have added a private cause of action to the Foreign Corrupt Practices Act,[83] leaving enforcement to U.S. governmental entities.

Moreover, the Department of State's communications with the District Court here did not contain any express "assurance from [the Executive] branch," that adjudication of respondent's claims would not "frustrate the conduct of the Nation's foreign policy." [84] For the Executive to invoke its authority as a political branch, it must state unequivocally that the action should go forward as a matter of U.S. foreign policy—not merely under its view of the law concerning the Act of State doctrine. The Department of State's letter in the present case expressed views only on a legal question—namely the applicability of the Act of State doctrine to inquiry into a foreign state's motivations. Based upon this legal conclusion (which we submit is unduly mechanical),[85] and the State Department's assumptions about the particular facts of this case, the letter concluded that the Department did "not believe the Act of State doctrine would bar the Court from adjudicating this dispute." [86] This is a con-

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[83] 15 U.S.C. § 78dd-1 (West Supp. 1989). The legislative history of the Foreign Corrupt Practices Act demonstrates that Congress expressly considered the issue of private enforcement but refused to grant a private cause of action. *See, e.g.*, S. 3379, 94th Cong., 2d Sess., 122 Cong. Rec. 12,604 (1976); *Prohibiting Bribes to Foreign Officials: Hearings on S. 3133, S. 3379, and S. 3418 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. (1976); *See also McLean v. International Harvester Co.*, 817 F.2d 1214 (5th Cir. 1987); *Shields ex rel. Sundstrand Corp. v. Erickson*, 710 F. Supp. 686 (N.D. Ill. 1989); *Eisenberger v. Spectex Industries, Inc.*, 644 F. Supp. 48 (E.D.N.Y. 1986); *Lewis ex rel. Nat'l Semiconductor Corp. v. Sporck*, 612 F. Supp. 1316 (N.D. Cal. 1985).

[84] *First Nat'l City Bank*, 406 U.S. at 769.

[85] *See also* Brief of the United States as *Amicus Curiae*, at 16-22 (June 1989).

[86] Petition for Writ of Certiorari, at A-75 (June 17, 1988).

sidered reasoned legal argument in the nature of an *amicus curiae* brief that is entitled to considerable weight *as a legal argument.* It is not, however, a "*Bernstein*" letter stating that the Act of State doctrine "should not" [87] be applied because of foreign relations concerns.[88] This Court therefore has no occasion to address squarely the question whether it should recognize the *Bernstein* exception to the Act of State doctrine.

## CONCLUSION

For the reasons stated above, the decision of the court of appeals should be reviewed and the complaint dismissed.

Respectfully submitted,

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August 24, 1989

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[87] Compare the *Bernstein* letter submitted in *First National City Bank*, which stated that "the Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." 406 U.S. at 764.

[88] Indeed, to the extent the Legal Adviser's letter mentions foreign relations concerns, it states that "inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations." Petition for Writ of Certiorari, at A-75 (June 17, 1988).